BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. CITY OF ISSAQUAH and SAMMAMISH DEVELOPMENT COMPANY, Respondent.	SHB No. 89-35 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a substantial development permit for a multi-family housing project on Issaquah Creek, came on for hearing on September 15, 1989, in Issaquah, Washington, before the Shorelines Hearings Board; Wick Dufford, presiding; Judith A. Bendor, Chair; Paul Cyr and Robert Hughes.

Allen T. Miller, Jr., Assistant Attorney General, represented appellant Department of Ecology. Wayne Tanaka, of Ogden Murphy and Wallace, City Attorneys, represented respondent City of Issaquah. Joel E. Haggard, attorney at law, represented Sammamish Development Company.

The proceedings were reported by Betty J. Koharski of Eugene Barker and Associates.

Witnesses were sworn and testified. Exhibits were admitted and examined. From the testimony heard and exhibits examined, the Board makes the following

FINDINGS OF FACT

I

On May 11, 1989, the City of Issaquah approved a substantial development permit to Sammamish Development Company to construct a 50 unit multi-family housing project consisting of five structures and associated parking and landscaping. The approval relates to an application first filed on January 28, 1988. The project is to be located on 4.23 acres at 260 N.W. Dogwood Street in Issaquah along the shorelines of Issaquah Creek.

II

The proposal, now called the Issaquah 50 project, will occupy a portion of a larger tract which was in King County until its annexation into the City of Issaquah in April 1985. The annexed area, approximately 188 acres in size was known in pre-annexation days as the "county island," because it was surrounded by property within the city.

III

Under the King County Shoreline Master Program, adopted by the Department of Ecology as a state regulation in WAC 173-19-250, and in

effect at the time of annexation, the "county island" shorelines are designated as a Conservancy environment.

The King County Shoreline Master Program, Section 25.24.090 states that "multi-family development is prohibited in the conservancy environment." (The only exceptions provided are not relevant here.)

IV

At about the same time that the "county island" was annexed, Issaquah adopted the Newport Subarea Plan, as an amendment to its comprehensive plan. The Newport Subarea includes the "county island" tract.

The Subarea Plan describes "shoreline management districts" and sets forth regulations applicable to such districts. The "county island" was included in the "Urban I" designation by this document -- an area within which multi-family developments are not prohibited.

V

The City of Issaquah has used the Newport Subarea plan since its adoption as the basis for making decisions on shoreline substantial development permit applications. However, the subarea plan has never been submitted to nor approved by the Department of Ecology as a shoreline master program. Indeed, no master program for the City of Issaquah has ever been approved by Ecology or adopted as state regulation.

VI

On December 8, 1988, Issaquah sent a letter to the project

manager for Issaquah 50 indentifying potentially significant adverse impacts in need of clarification. This included the following under the heading "Shoreline Management Plan:"

> A Shoreline Management Substantial Development Permit cannot be granted under the only adopted Shoreline Master Program for this area along Issaquah Creek. This is true because the site is in what was once part of King County before the area was annexed into the City. Because Issaquah has no formally adopted Master Program, King County's program still applies to this site. per WAC 173-19-044. The environment designation is Conservancy, which under King County's program prohibits multi-family within the shoreline jurisdiction.
>
> Issaquah is in the process of adopting a Shoreline Master Program for the entire length of Issaquah Creek within the city. In this plan, the environment designation assigned to this section of Creek differs with each alternative: under Alternative A, this section is designated Conservancy Riparian; under Alternative B, this section is designated Urban Riparian; and, under Alternative C, this section is designated Urban Low Intensity. Only under Alternative C (Urban Low Intensity with 50 foot setbacks) and perhaps Alternative B (Urban Riparian with 60 foot setbacks) could the project be built as currently configured.
>
> While it seems clear that the City of Issaquah's intention is to adopt shoreline environments in this area along Issaquah Creek in which multi-family development can take place, it is far from clear how the Washington State Department of Ecology will view any application for a substantial development permit prior to the formal adoption of a Shoreline Management Program for the City. If the proponent wants to apply for this permit prior to the adoption of the City's own Shoreline Plan, he should immediately begin consultations with the Department of Ecology.

VII

The project manager responded to these comments by letter dated December 12, 1988, as follows:

> We understand that a Shoreline Management Substantial Development Permit cannot be granted under the presently adopted Shoreline Master Program for this area along Issaquah Creek.
>
> However, on the strength of the approval of the City Council of the 50 foot setback, the dedication of said 50 feet plus an additional 13,000 square feet of parkland to the City, and the fact that the most likely Shoreline alternative of the three alternatives under consideration by the City as it studies a new Master Program, would allow the project to be built as presently configured, we choose to proceed with the application.

VIII

On December 22, 1988, Issaquah issued a mitigated Determination on Nonsignificance (MDNS) in relation to the Issaquah 50 project for purposes of the State Environmental Policy Act (SEPA). The MDNS contained nine conditions imposed on the developer.

On January 5, 1989, Ecology sent its comments on the MDNS to Issaquah. Among other things, the agency stated:

> The proposed project appears to be prohibited by the applicable King County Shoreline Master Program, which designates the shoreline area "Conservancy." If the proponents wish to pursue the project they will have to: (1) apply for a shorelines conditional use permit in accordance with WAC 173-14-150(5), 140(1)(a), and 140 (3); and/or (2) wait for the city and ecology to approve a shoreline master program that allows the proposed use and then apply for a shoreline permit.

If option I is chosen and the city subsequently adopts a master program that allows the proposed use, then the proponents would have the option of having all applicable provisions of the newly adopted master program applied in review of their proposal (as required by mitigating condition #8). However, the city should wait until Ecology adopts the master program changes before determining consistency with such provisions and must wait for Ecology adoption before deciding whether to approve the permit. We would like an opportunity to review the proposal for consistency with the master program that is ultimately adopted before the city makes a decision on the permit for this project.

IX

As a result of Ecology's comments, Issaquah on January 27, 1989, modified condition No. 8 of the MDNS to read:

> In order to ensure adequate protection for the environmentally sensitive shoreline environment, the applicant agrees to abide by setbacks and use regulations to be specified for the environment designation applied to this site in any formally adopted Issaquah Shoreline Master Program. The applicant understands that any Master Program adopted by the City must be reviewed and approved by the Washington State Department of Ecology. No shoreline substantial development permit can be issued until this approval process is complete. This condition is consistent with Chapter 14.04 Environmental Policy. Issaquah Municipal Code and the Issaquah Comprehensive Plan as amended. (Changes from original underlined.)

X

As of May 1989 when the City approved the Issaquah 50 permit, no shoreline master program had yet been submitted to Ecology for approval.

In June 1989, the City of Issaquah approved a shoreline master program and, thereafter, submitted the same to the Department of Ecology. The proposed version submitted to Ecology placed the Issaquah 50 site in an "Urban Riparian" environment, with no prohibition of multifamily residential development.

XI

On August 31, 1989, Ecology sent Issaquah an eleven page single-spaced letter commenting on the submitted master program. The letter enclosed suggested revisions in the use tables which would prohibit multi-family development in the "Urban Riparian" environment. Ecology asked the City to make revisions before resubmittal of the master program for formal approval by the state.

XII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to the following

CONCLUSIONS OF LAW

I

The Board has jurisidiction over the parties and the subject matter. RCW 90.58.180.

II

Within a little over three years after the passage of the Shoreline Management Act (SMA) in 1971, local jurisdictions were

expected to develop their own master programs for regulation of shoreline uses. RCW 90.58.080. If any local jurisdiction failed to develop a program within this time frame, Ecology was directed to write a program for that jurisdiction. RCW 90.58.070.

For the City of Issaquah a master program has been much slower in coming than contemplated by the statutory scheme.

III

Master programs, once locally developed, are subject to review and approval by Ecology. None are effective until that approval is made. RCW 90.58.090. The final step to the effectiveness of a master program is rulemaking adoption pursuant to the Administrative Procedure Act. RCW 90.58.120.

Thus, the result of the approval process, when carried out, is ultimately to make every local master program a part of a state regulation. See chapter 173-19 WAC. Until incorporated into the Washington Administrative Code, a local master program is not effective for purposes of the SMA. See Harvey v. San Juan County, 90 Wn.2d 473, 584 P.2d 391 (1978).

IV

The heart of the SMA's regulatory program is a permit system established to apply to all developments defined as "substantial." RCW 90.58.140.

After the applicable master program is adopted and in place, any permit application is to be measured against the provisions of the applicable master program and the provisions of the SMA statute itself. RCW 90.58.140(2)(b).

But, before the applicable master program becomes effective, interim standards for processing permits are provided in RCW 90.58.140(2)(a), requiring consistency with:

> (i) The policy of RCW 90.58.020; and (ii) after their adoption, the guidelines and rules of the department; and (iii) so far as can be ascertained, the master program being developed for the area. (emphasis added.)

V

In 1979 after some years of experience with the master program adoption and permit issuance processes, the Department of Ecology adopted a regulation dealing with the effect of a local government change of jurisdiction through annexation. As presently written that section, WAC 173-19-044, reads:

> In the event of annexation of a shoreline area, the local government assuming jurisdiction shall amend or develop a master program to include the annexed area. Such amendment or development shall be in accordance with the procedures established in chapter 173-16 WAC and this chapter and shall be submitted to the department. Until a new or amended program is adopted by the department, any ruling on an application for permit in the annexed shoreline area shall be based upon compliance with the preexisting master program adopted for the area. (emphasis added.)

VI

In the instant case, Ecology argues that issuance of the permit in question must be reversed because the use contemplated is prohibited by the King County Shoreline Master Program. Ecology's position is that WAC 173-19-044 dictates the result and that the King County program must be applied until an Issaquah Master Program covering the area is adopted at the state level.

Respondent's position is that, under all the circumstances, the permit should be sustained as consistent with either the Newport Subarea plan or the master program submitted to Ecology in the summer of 1989. One of these documents, they say, constitutes an "ascertainable" master program, the reference for permit approval pursuant to RCW 90.58.140(2)(a)(iii).

VII

We conclude that WAC 173-19-044, by its terms, is applicable. There is a preexisting master program adopted for the area. A new program developed by the local government assuming jurisdiction has not yet been adopted by the Department of Ecology.

Recourse to an "ascertainable" master program is had before "such time as an applicable master program has become effective." RCW 90.58.140(2)(a). This interim standard applies only where there is, otherwise, a regulatory void -- where no effective master program addresses the geographic area concerned.

Therefore, the King County Shoreline Master Program governs in this case.

VIII

We do not consider the choice of law made here to be merely a mechanical matter. There are reasons of policy for the choice.

Because the final adopted and effective program may differ widely from the drafts considered in the approval process, the "ascertainable" program standard is very difficult to apply. See Portage Bay Community Council v. Shorelines Hearings Board, 92 Wn.2d 1, 593 P.2d 151 (1979).

Therefore, where there is an adopted program available, the proper course is to rely on its known and established legal standards, rather than guessing as to what may emerge from an incomplete dynamic process. The approach we take is consistent with the general rule that a yet to be adopted zoning proposal cannot be the basis for rendering meaningless existing zoning requirements. Norco Construction v. King County, 98 Wn.2d 680, 649 P.2d 103 (1982).

IX

Further, the application of Ecology's "annexation" rule, preserves the integrity of the SMA's master program development and review process, involving give and take between both local and state government under RCW 90.58.090. The result we reach does not dictate the final form of the master program. Projects of this kind may

ultimately be allowed. But if this is the result, the planning process will have run its proper course, and the decision will flow from the completed plan.

X

Normally local regulations do not have extraterritorial effect. However, here the annexation by Issaquah does not terminate the applicability of the King County Shoreline Master Program. This is because the annexation rule of WAC 173-19-044 is a rule of statewide effect, not a local regulation and the King County program itself is part of a state regulatory scheme.

Assuming that the state regulations involved are reasonably consistent with the statute they support to implement, Weyerhaeuser Company v. Department of Ecology, 86 Wn 2d 310, 545 P.2d 5 (1976), the state law provisions must govern over any conflicting locally adopted requirements. See generally, Ritchie v. Markley, 23 Wn. App. 569, 597 P.2d 449 (1979).

XI

The vested rights doctrine applies to shoreline substantial development permits. Talbot v. Gray, 11 Wn. App. 807, 525 P.2d 801 (1974). This means that the applicable shoreline program is the program in force at the time of the application for the permit. In this case, the effect is that the applicant's rights to develop vested under the terms of the King County Shoreline Master Program.

XII

We are keenly aware that (unless the parties earlier reach a settlement) the applicant here is being forced to wait for an ultimate answer until the final adoption of Issaquah's master program. On the record it appears that the developer decided to proceed with its eyes open, knowing about the master program uncertainty. Nonetheless, it is clear that no one expected the process to take so long. We strongly urge the governmental entities involved to expedite their consultations, so that a definitive response to the question of multi-family residential development in the area can be made soon.

XIII

If there is a proper case for application of equitable estoppel against a position asserted on appeal to this Board by the Department of Ecology, we conclude that this is not that case. See Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968).

XIV

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From the foregoing Conclusions of Law the Board makes the following

ORDER

The approval of a substantial development permit (SM 87-05) for the Sammamish Development Company's Issaquah 50 project is reversed.

DONE this 22nd day of November, 1989.

SHORELINES HEARINGS BOARD

WICK DUFFORD, Presiding Officer

JUDITH A. BENDOR, Chair

PAUL CYR, Member

ROBERT HUGHES, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. CITY OF ISSAQUAH and SAMMAMISH DEVELOPMENT COMPANY, Respondent.	SHB NO. 89-35 ORDER ON MOTION FOR RECONSIDERATION

On November 29, 1989, Joel E. Haggard, Attorney at Law, representing respondent Sammamish Development Company, filed a Petition for Reconsideration of the Board's final Order in this matter.

The City of Issaquah responded to this petition on December 11, 1989, and the Department of Ecology responded on December 18, 1989. Sammamish Development filed a reply on December 20, 1989.

Having considered the request, the responsive submissions, and having reviewed the file and record herein and being fully advised,

NOW THEREFORE the Order on page 14 of the Board's decision dated

November 22, 1989, is herby modified to read as follows:

ORDER

The approval of a substantial development permit (SM 87-05) for the Sammamish Development Company's Issaquah 50 project is reversed. The permit is remanded to the City of Issaquah to be held pending the approval and adoption of a City of Issaquah Shorelines Master Program at WAC 173-19-2510. Once a Master Program is approved and adopted, the permit should be reviewed by Issaquah for compliance with said program and issued or denied as that review dictates.

DONE this 8th day of January, 1990.

SHORELINES HEARINGS BOARD

WICK DUFFORD, Presiding Officer

JUDITH A. BENDOR, Chair

PAUL CYR, Member

ROBERT HUGHES, Member